COURT OF APPEAL OF YUKON

Citation: *Wood v. Yukon (Public Service Commission)*, 2018 YKCA 15

Date: 20181219
Docket: 18-YU830

Between:

Juanita Wood

Appellant
(Petitioner)

And

Government of Yukon, as represented by the Public Service Commission and Yukon Human Rights Commission Members Chabot, Knutson, Moir and Bouvier

Respondent
(Respondent)

Before: The Honourable Mr. Justice Savage
The Honourable Madam Justice Fisher
The Honourable Madam Justice Smallwood

On appeal from: An order of the Supreme Court of Yukon, dated July 20, 2018 (*Wood v. Yukon (Government of)*, 2018 YKSC 34, Whitehorse S.C. No. 17-AP019).

The Appellant appearing in person:	J. Wood
Counsel for the Respondent:	I.H. Fraser
Place and Date of Hearing:	Whitehorse, Yukon November 21, 2018
Place and Date of Judgment:	Vancouver, British Columbia December 19, 2018

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Mr. Justice Savage
The Honourable Madam Justice Smallwood

Summary:

The appellant was declared to be a vexatious litigant under s. 7.1 of the Supreme Court Act, having been found to have persistently instituted vexatious proceedings. She appealed the order on the basis that she had not instituted more than one proceeding that could be considered vexatious. Held: Appeal dismissed. The chambers judge properly exercised her discretion in making the declaration, and was careful in assessing the proceedings she considered to be vexatious within the context of the whole history of the matter.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] The appellant, Juanita Wood, appeals a decision made under s. 7.1 of the *Supreme Court Act* declaring her to have persistently instituted vexatious proceedings and prohibiting her from instituting a proceeding in the Yukon Supreme Court except with leave of that court.

Background

[2] In February 2015, Ms. Wood was "rejected on probation" from her employment with the Department of Highways and Public Works. Thereafter, she commenced numerous proceedings seeking various remedies, all of which have been dismissed, struck or withdrawn:

1. On February 18, 2015, Ms. Wood appealed her termination to the Deputy Minister of the Department of Highways and Public Works, a process provided for in the collective agreement. The Deputy Minister dismissed the appeal, concluding that the employer's concerns about her conduct and behaviour were substantiated.

2. On March 5, 2015, Ms. Wood filed a complaint with the Workers' Compensation Health and Safety Board, alleging that the Government had retaliated against her for raising safety concerns, contrary to s. 18(1) of the *Occupational Health and Safety Act*, R.S.Y. 2002, c. 159 [*OHSA*]. In November 2015, a safety officer determined that a prosecution of the employer was not warranted. Ms. Wood appealed that decision to an appeal panel, which in February 2016 declared that

it would not interfere with the decision not to prosecute. She sought a reconsideration of that decision but withdrew that request in May 2016. In June 2017, Ms. Wood sought to restart her appeal but again withdrew that request in December 2017. (This was described by the chambers judge as “Proceeding One”.)

3. On April 5, 2016, Ms. Wood filed a complaint with the Yukon Human Rights Commission, alleging discrimination on the basis of her sex while she was employed by the Department of Highways and Public Works. The Director of Human Rights terminated this complaint in October 2016 on the basis, in part, that allowing aspects of it to proceed would be vexatious, “as the human rights complaint system cannot be used as simply another forum in which to pursue what is essentially the same complaint as has been brought in other forums, in the hopes that a different outcome will be achieved”. The Commission confirmed the Director’s decision in May 2017. (This was included in the chambers judge’s description of “Proceeding Four”.)

4. On May 27, 2016, Ms. Wood commenced an action against the Department of Highways and Public Works in Yukon Supreme Court but that claim was struck on the basis that it disclosed no reasonable claim and was both vexatious and an abuse of process: *Wood v. Yukon (Highways and Public Works)*, 2016 YKSC 68. An appeal to this Court was quashed as being devoid of merit, in reasons indexed as 2017 YKCA 4. (This was described by the chambers judge as “Proceeding Two”.)

5. On April 27, 2017, Ms. Wood commenced a petition seeking judicial review of the decision to terminate her employment. This petition was dismissed by consent in May 2018. (This was described by the chambers judge as “Proceeding Three”.)

6. On January 22, 2018, Ms. Wood filed another petition seeking judicial review of the Workers' Compensation Health and Safety Board's refusal to initiate a prosecution against the Department of Highways and Public Works under s. 18(1) of the *OHSA*. That petition was struck as being vexatious and an abuse of process, and disclosing no reasonable claim. (This was described by the chambers judge as "Proceeding Five".) Ms. Wood's appeal of that decision was subsequently dismissed by this Court, in reasons indexed as 2018 YKCA 16.

[3] On March 14, 2018, Ms. Wood filed the petition that is the subject of this appeal (included in the chambers judge's description of "Proceeding Four"). In it, she seeks to set aside the decision of the Human Rights Commission to terminate their investigation into her complaint. On May 17, 2018, the respondent Government of Yukon applied for orders declaring Ms. Wood to be a vexatious litigant and prohibiting her access to the court without leave. That application, which was allowed by Miller J., is the decision under appeal.

Legal principles

[4] The *Supreme Court Act*, S.Y. 2013, c. 15, provides in s. 7.1:

> (1) If on application or its own motion, the Court is satisfied that a person has persistently instituted vexatious proceedings or has conducted a proceeding in a vexatious manner, it may, after giving notice to the Attorney General of Yukon and giving the person the opportunity to be heard, order that except by leave of the Court
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> > (a) the person must not institute a proceeding on behalf of themselves or another person; or
> >
> > (b) a proceeding previously instituted by the person must not be continued.

[5] The power granted to the Supreme Court under this section is an adjunct to its inherent authority to control its own process. It is similar to provisions applicable in other courts, and permits the Supreme Court to prevent abuse of its process by a litigant who brings unmeritorious proceedings that result in unnecessary time and

expenses to both the court and to other parties: see *Dawson v. Dawson*, 2014 BCCA 44 at para. 17.

[6] Section 7.1 requires that a litigant has either “persistently instituted vexatious proceedings” or “conducted a proceeding in a vexatious manner”. The first alternative requires more than one proceeding but the second does not.

[7] The factors to be considered in such an application were set out in *Re Lang Michener and Fabian* (1987), 59 O.R. (2d) 353 at 358–59 (H.C.):

> (a) the bringing of one or more actions to determine an issue which has already been determined by a court of competent jurisdiction constitutes a vexatious proceeding;
>
> (b) where it is obvious that an action cannot succeed, or if the action would lead to no possible good, or if no reasonable person can reasonably expect to obtain relief, the action is vexatious;
>
> (c) vexatious actions include those brought for an improper purpose, including the harassment and oppression of other parties by multifarious proceedings brought for purposes other than the assertion of legitimate rights;
>
> (d) it is a general characteristic of vexatious proceedings that grounds and issues raised tend to be rolled forward into subsequent actions and repeated and supplemented, often with actions brought against the lawyers who have acted for or against the litigant in earlier proceedings;
>
> (e) in determining whether proceedings are vexatious, the court must look at the whole history of the matter and not just whether there was originally a good cause of action;
>
> (f) the failure of the person instituting the proceedings to pay the costs of unsuccessful proceedings is one factor to be considered in determining whether proceedings are vexatious;
>
> (g) the respondent's conduct in persistently taking unsuccessful appeals from judicial decisions can be considered vexatious conduct of legal proceedings.

[8] A more detailed examination of the indicia of vexatious litigation was provided in *Chutskoff v. Bonora*, 2014 ABQB 389, but the basic principles are amply reflected in the factors listed above.

[9] Section 7.1 does not limit “vexatious proceedings” to those brought in the Supreme Court. In *Ramirez v. Mooney*, 2017 YKSC 22, Veale J. held that there is no requirement that the proceedings must all originate in the same court in Yukon.

[10] A similar approach was taken in *Canada v. Olumide*, 2017 FCA 42 [*Olumide*], where an application was made under a similarly worded provision in s. 40 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. Stratas J.A. considered the litigant's conduct in various courts, as well as previous findings of vexatious conduct in other courts, in concluding that an order under s. 40 was warranted.

[11] Even where the legislation is more limited, courts have assessed a litigant's conduct in the context of proceedings in other courts or tribunals. For example, s. 29 of British Columbia's *Court of Appeal Act*, R.S.B.C. 1996, c. 77, refers to vexatious proceedings commenced "in the court". A similarly worded provision is contained in s. 23.1 of Alberta's *Judicature Act*, R.S.A. 2000, c. J-2. In *R.D. Backhoe Services Inc. v. Graham Construction and Engineering Inc.*, 2017 BCCA 91, Harris J.A. held that the analysis of a vexatious litigant under s. 29 may be informed by the litigant's conduct in the courts below (at para. 30). In *Thompson v. International Union of Operating Engineers*, 2017 ABCA 193 at paras. 24–25, Schutz J.A. held that a court may take judicial notice of the public record as evidence of the nature and degree of a litigant's misconduct, even in unrelated proceedings (at para. 25).

[12] I agree with the approach taken in *Ramirez*, given that an assessment of whether an order should be made under s. 7.1 includes consideration of the whole history of a matter. I would caution only this. While the Supreme Court may consider the history of a litigant's conduct in other courts or tribunals in assessing whether a litigant has persistently instituted vexatious proceedings, it must not lose focus on the litigant's conduct in the Supreme Court in determining whether an order is necessary to prevent an abuse of that court's process.

[13] A determination under s. 7.1 involves the exercise of discretion that is entitled to deference. However, this Court may interfere where the judge has misdirected herself as to the applicable law or made a palpable or overriding error in the assessment of the facts. A failure to apply the applicable legal criteria for the exercise of a judicial discretion, or a misapplication of them, raises questions of law:

Cliffs Over Maple Bay (Re), 2011 BCCA 180 at para. 24; *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.

The chambers judge's decision

[14] The chambers judge reviewed the history of the litigation brought in various forums by Ms. Wood and considered the factors to be taken into account in assessing vexatious proceedings, set out in *Re Lang Michener*. She held that she could properly consider the findings of vexatiousness by the chambers judge in the May 27, 2016 action as well as "the findings" made by this Court on appeal, and found that there had therefore been at least two vexatious proceedings. She also relied on the April 27, 2017 petition seeking judicial review of the decision to terminate Ms. Wood's employment and found that Ms. Wood's conduct was vexatious "in respect of the substance of the proceeding and the fact that she chose not to proceed after engaging significant judicial resources". She did not consider the January 22, 2018 petition because it was under appeal at the time, but she agreed with Bielby J.'s assessment that the history of Ms. Wood's persistent litigation of the same issue met "many if not all of the factors required for a finding that the litigation is vexatious".

[15] The judge was satisfied that "this series of actions" amounted to "persistently instituted vexatious proceedings" as contemplated in s. 7.1(1) of the *Supreme Court Act*, stating further at paras. 34–35:

> [34] … I find that the findings of vexatiousness in the other proceedings as noted above are persuasive. They are clearly articulated and solidly based in law and fact. I take into account in arriving at this finding, in particular, that Ms. Wood's conduct in persistently taking unsuccessful appeals can be considered vexatious conduct of legal proceedings. I find that in these circumstances it does.
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> [35] I direct myself, in determining whether Ms. Wood's conduct is vexatious, to look at the whole history before me. I am satisfied that Ms. Wood has brought all of the proceedings noted above to determine the same issue: the validity of her dismissal from the Department of Highways and Public Works. I find that that issue has already been determined by courts of competent jurisdiction.

On appeal

[16] Ms. Wood submits that the chambers judge made numerous errors, some errors of law and some of fact. Her submissions focus largely on the merits of each proceeding. In essence, she says that the judge erred in declaring her to be a vexatious litigant on the basis of only two proceedings, one which was an appeal, and the other which was dismissed by consent. While she concedes that the May 27, 2016 action was vexatious, she says that the April 27, 2017 petition was not. She submits that it was a valid proceeding, was not advanced for any improper purpose, and was discontinued after she received legal advice that it would not likely result in reversing the termination decision.

[17] Ms. Wood also raises a new issue on appeal regarding the requirement of notice to the Attorney General and the Attorney's role representing the public interest in access to the courts.

[18] The respondent submits that the chambers judge correctly identified two or more proceedings brought by Ms. Wood as being vexatious and made no error in finding that she had "persistently instituted vexatious proceedings". The respondent does not object to the new issue being addressed if the Court considers that it would be in the interests of justice to do so.

Analysis

Vexatious declaration

[19] In my view, the chambers judge properly exercised her discretion in declaring Ms. Wood to have persistently instituted vexatious proceedings. She was careful not to take into account any proceedings that were not before the Supreme Court or were under appeal, but she properly considered the whole history of the matter.

[20] The judge did err in finding that "Proceeding One"—the March 5, 2015 complaint to the Workers' Compensation Health and Safety Board—did not come before the court, as this was the subject of "Proceeding Five"—the January 22, 2018 petition. However, nothing substantive turns on this, as she did not consider that

petition to be a vexatious proceeding since the decision was under appeal at the time. She restricted her findings of vexatious proceedings to the May 27, 2016 action and appeal, and the April 27, 2017 petition.

[21] Ms. Wood referred to *Foy v. Foy (No. 2)* (1979), 26 O.R. (2d) 220 (C.A.), where the majority decision interpreted "instituted vexatious proceedings" in the *Vexatious Proceedings Act*, R.S.O. 1970, c. 481 as applying only to the commencement of an action or proceeding by writ or originating notice of motion and not including the launching of an appeal (at 230–31). The implication of this decision is that the appeal from the May 27, 2016 action would not be considered a separate proceeding for the purpose of determining whether Ms. Wood has "persistently instituted vexatious proceedings" within the meaning of s. 7.1 of the *Supreme Court Act*.

[22] The respondent asserts that *Foy* has not generally been followed for that proposition, but, in any event, submits that an appeal should be considered a separate proceeding in the context of s. 7.1.

[23] In my view, it is not necessary to address *Foy*, other than to note that the legislation in Ontario has since been amended to permit an order to be made where a person has "persistently and without reasonable grounds… conducted a proceeding in any court in a vexatious manner": *Courts of Justice Act*, R.S.O. 1990 c. 43, s. 140(b). Whether or not the May 26, 2017 proceedings before the Supreme Court and the Court of Appeal constitute two proceedings, the chambers judge did not rely only on this matter but also on the April 27, 2017 petition, which she found was vexatious.

[24] Although the April 27, 2017 petition was dismissed by consent, the judge was concerned about the fact that the dismissal did not occur until May 2018, several days before the matter was to be heard, and after significant resources had been engaged. In the context of Ms. Wood's entire history of bringing proceedings related to the same matter, I see no basis on which to interfere with the judge's

consideration of this proceeding as vexatious, especially in light of Ms. Wood's acknowledgement that she had little chance of obtaining the remedy sought.

[25] Ms. Wood expressed particular concern about the fact that the chambers judge's order was based on only two distinct proceedings, especially when other cases are considered. For example, in *Olumide*, the respondent had brought at least 47 matters in various courts over a period of about three years. I appreciate the contrast here, but it is important to note that the definition of "vexatious", in the context of s. 7.1 of the *Supreme Court Act*, encompasses many different circumstances that do not require an extreme volume of matters. It is also important to note the observations of Stratas J.A. in *Olumide*, that too often, vexatious proceedings are not commenced for months or years, after much damage has been done.

[26] I cannot accept Ms. Wood's submission that her claims are "the legitimate assertion of legislated rights under three separate pieces of legislation". While she may have used different vehicles, her destination was always the same: to determine the validity of the termination of her employment with the Department of Highways and Public Works. There was ample evidence to support the judge's conclusion that the history of Ms. Wood's persistent litigation was to this aim, and that this met many of the factors to be taken into account in an application under s. 7.1.

[27] In this case, those factors include (1) bringing numerous proceedings to determine an issue that was already determined; (2) bringing proceedings that were bound to fail; (3) repeating the same issues in different forms in subsequent proceedings and seeking superficially different remedies; and (4) persistently taking unsuccessful appeals and reviews before the various tribunals and courts.

New issue – the role of the Attorney General

[28] Section 7.1 of the *Supreme Court Act* has a feature that is different from similar provisions in other jurisdictions, in that the Attorney General of the Yukon is entitled to receive notice of any application and to appear at the hearing.

[29] Ms. Wood raises the issue of notice to the Attorney General to support a submission that the hearing before the chambers judge was unfair. She says that the Attorney General was not given an opportunity to attend the hearing and therefore she was denied the protection afforded by the Attorney, who may make submissions in the public interest. This is particularly important, she submits, where a litigant's right of access to the courts might be restricted.

[30] We were advised that the chambers judge asked the respondent's counsel if notice had been given to the Attorney General, but Ms. Wood raised no issue about this before the chambers judge. Given this, I think it is appropriate for this Court to comment only briefly on the issue of notice.

[31] First, the *Supreme Court Act* does not prescribe how notice to the Attorney General is to be given or by whom. In this case, the respondent is the Government of Yukon and it is represented by counsel from the Yukon Department of Justice. The *Department of Justice Act*, R.S.Y. 2002. c. 55 provides that the Minister of Justice presides over the Department, is the legal advisor of the Government, and is, *ex officio*, the Attorney General of the Yukon. Therefore, from this broad perspective, the respondent's application in this case was conducted on its behalf by counsel acting on the instructions of the Attorney General. Therefore, it cannot be said that the Attorney General had no notice of the application.

[32] Second, while the Attorney General is entitled to appear at a hearing for which she has received notice, she is not obliged to do so, a point conceded by Ms. Wood. It is apparent that the Attorney General will do so within that role where she considers it important to make submissions on certain issues. That is what occurred in *Ramirez*, which did not involve the Government as a party. However, that is not what occurred in this case. The fairness of the hearing before the chambers judge cannot be questioned on this basis alone.

Disposition

[33] For all of these reasons, I would dismiss the appeal with costs to the respondent.

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Mr. Justice Savage"

I AGREE:

"The Honourable Madam Justice Smallwood"